



STATE OF NEW YORK

UNEMPLOYMENT INSURANCE APPEAL BOARD

PO Box 15126

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DECISION OF THE BOARD

Mailed and Filed: JUNE 22, 2022

IN THE MATTER OF:

Appeal Board No. 621506

PRESENT: MARILYN P. O'MARA, MEMBER

In Appeal Board No. 621505, an appeal by the claimant was processed to the Appeal Board from the decision of the Administrative Law Judge filed February 3, 2022, which sustained the initial determination holding the claimant ineligible to receive benefits, effective April 27, 2020 through August 29, 2021, on the basis that the claimant was not totally unemployed, inadvertently recited in the Administrative Law Judge decision as effective beginning April 27, 2020 through March 14, 2021 and from March 29, 2021 through August 29, 2021.

In Appeal Board Nos. 621506 and 621507, the claimant appeals from the decisions of the Administrative Law Judge filed February 3, 2022, which sustained the initial determinations charging the claimant with an overpayment of \$5,291 in regular unemployment insurance benefits recoverable pursuant to

Labor Law § 597 (4), and \$8,547 in Pandemic Emergency Unemployment

Compensation (PEUC) benefits repayable pursuant to § 2107 (e) (2) of the

Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020; and reducing the claimant's right to receive future benefits by 208 effective days and charging a civil penalty of \$2,075.70 on the basis that the claimant made willful misrepresentations to obtain benefits.

At the combined telephone conference hearing before the Administrative Law Judge, all parties were accorded a full opportunity to be heard and testimony was taken. There were appearances on behalf of the claimant and the employer.

In Appeal Board No. 621505, it now appears that the appeal was processed through inadvertence, as the record contains no actual request for an appeal from the Judge's decision in 121-13808, regarding the issue of lack of total unemployment.

In Appeal Board Nos. 621506 and 621507, based on the record and testimony in this case, the Board makes the following

FINDINGS OF FACT: Since 1998, the claimant has worked for this employer as a custodian. In the week ending May 3, 2020 through the week ending March 14, 2021 and in the week ending April 4, 2021 through the week ending August 29, 2021, for a set hourly wage, she worked fifteen hours per week which hours were spread over five days per week.

In early 2020, the claimant also worked full-time for another employer. Due to the pandemic, she was laid off in March 2020. The claimant filed an original claim for benefits effective March 9, 2020. At the filing, the claimant told a Department of Labor employee that she continued to work part-time. She was informed that this would not interfere with collecting benefits from the lost employment.

From the week ending May 17, 2020 through the week ending August 29, 2021, the claimant certified each week that she worked zero days during the week. The weekly certifications did not mention a specific employment. As a result, the claimant received \$5,291 in regular unemployment insurance benefits and then \$8,547 in PEUC benefits.

OPINION: In 121-13808, for the period of April 27, 2020 through August 29, 2021, the Judge's decision found that the claimant lacked total unemployment on two days in each of the weeks comprising the two sub periods of April 27, 2020 through March 14, 2021 and March 29, 2021 through August 29, 2021.

There was no appeal from that portion of the decision. Therefore, we are bound by that decision that the claimant lacked total unemployment as stated in the initial determination on two days per week.

The initial determinations before the Board first issued on October 27, 2021, which is more than one year after part of the period covered by the initial

determination of recoverable overpayment. Pursuant to Labor Law §597(3), a

willful misrepresentation on the claimant's part must be established in order for the Commissioner of Labor to have had the authority to issue a redetermination of benefits received during the period beginning April 27, 2020.

The credible evidence establishes that each week the claimant stated as part of the certification process that she did not work. The claimant has testified that she was working 15 hours per week divided into three hours per shift in long-standing employment, so she knew she was working. Each of these statements is factually false. Since the claimant knew she was working, each of these certifications is an intentionally made statement and constitutes a willful misrepresentation to obtain benefits. "Willful" as used here does not imply a criminal intent to defraud but means "knowingly", "intentionally", "deliberately" to make a false statement (see Matter of Vick, 12 AD2d 120 [3rd Dept 1960]). The claimant has contended that she did not knowingly, intentionally or deliberately make a false statement. However, the claimant admitted that during the certifications, she was not asked for which employment she was certifying. As such, we are not persuaded by the contention that she assumed the questions pertained to the lost employment. We note that the claimant

has not contended that she was advised to falsely certify for benefits weekly.

There are 68 weeks in total from the week ending May 3, 2020 through the week ending March 14, 2021 and the week ending April 4, 2021 through the week ending August 29, 2021. However, the record contains no evidence that the claimant certified on May 16, 2020 for the weeks ending May 3, 2020 and May 10, 2020. Accordingly, we conclude that each of the remaining 66 certification statements constitutes a willful misrepresentation to obtain benefits. In addition, we conclude that there was jurisdiction to issue the initial determinations at issue.

The credible evidence establishes that the claimant received \$5,291 in regular unemployment insurance benefits. As the claimant lacked total unemployment two days per week, she was overpaid these benefits. Accordingly, due to the factually false statements, we conclude that the regular unemployment insurance benefits are recoverable. Since the record contains no evidence that the claimant made any certifications for the weeks ending May 3, 2020 and May

10, 2020, the amount of the overpayment of regular unemployment insurance benefits is referred to the Department of Labor to be recalculated in accordance with this decision.

The credible evidence further establishes that the claimant received PEUC benefits in the amount of \$8,547. The claimant was not entitled to receive those PEUC benefits because she lacked total unemployment on two days per week. Accordingly, consistent with federal law, we conclude that the PEUC benefits are recoverable.

As the claimant has made willful misrepresentations to obtain benefits, she is subject to a forfeit penalty. In addition, with a recoverable overpayment and even one willful misrepresentation, the claimant is subject to a civil penalty. The amounts of the civil penalty and the forfeit penalty are also referred to the Department of Labor to be recalculated in accordance with this decision.

DECISION: In Appeal Board No. 621505, the appeal is dismissed.

The decision of the Administrative Law Judge in 121-13808 is continued in effect.

In Appeal Board Nos. 621506 and 621507, the decisions of the Administrative Law Judge are modified as follows and, as so modified, are affirmed

In Appeal Board No. 621506, the initial determination, charging the claimant with an overpayment of \$5,291 in regular unemployment insurance benefits recoverable pursuant to Labor Law § 597 (4), and \$8,547 in Pandemic Emergency

Unemployment Compensation (PEUC) benefits repayable pursuant to § 2107 (e) (2)

of the Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020, is modified in accordance with this decision, and, as so modified, is sustained.

In Appeal Board No. 621507, the initial determination, reducing the claimant's right to receive future benefits by 208 effective days and charging a civil penalty of \$2,075.70 on the basis that the claimant made willful misrepresentations to obtain benefits, is modified in accordance with this decision, and, as so modified, is sustained.

The amounts of the recoverable overpayment, civil penalty and forfeit penalty are referred back to the Department of Labor for recalculation.

In Appeal Board Nos. 621506 and 621507, the claimant is denied benefits with respect to the issues decided herein.

MARILYN P. O'MARA, MEMBER